2013 IL App (1st) 120226-U

SIXTH DIVISION
December 13, 2013

No. 1-12-0226

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 2542
	)	
CHARLES BETTON,	)	
	)	Honorable Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Rochford and Justice Lampkin concurred in the judgment of the court.

O R D E R

¶ 1 ***Held:*** The defendant's conviction and sentence for possession of a controlled substance were affirmed. (1) The trial court did not err in denying the defendant's motion to quash arrest and suppress his second inculpatory statement to police. (2) The defendant failed to establish that but for trial counsel's alleged errors, there was a strong probability that the defendant's second inculpatory statement to police would have been suppressed,

resulting in his acquittal.

¶ 2 Following a bench trial, defendant Charles Betton was found guilty of possession of a controlled substance and sentenced to a term of six years' imprisonment in the Department of Corrections. He appeals contending that: (1) the trial court erred when it denied his motion to quash arrest and suppress evidence, and (2) he was denied effective assistance of counsel. For the reasons set forth below, we affirm defendant Betton's conviction and sentence.

¶ 3 Following his arrest, defendant Betton filed a motion to quash arrest and suppress evidence. The following facts are taken from the testimony at the hearing on the motion.

¶ 4 Based on information from an informant, on January 10, 2011, Chicago police obtained a warrant to search Fayln Thompson, a suspected drug dealer, and a residence at 8445 South Paulina Avenue in Chicago. At 12:34 a.m., on January 11, 2011, 18 armed officers entered Ms. Thompson's residence where they encountered defendant Betton. He was not a subject of the search or named in the search warrant. Because he was present in the residence at the time of the search, defendant Betton was handcuffed, along with Ms. Thompson and her mother.

¶ 5 Chicago police officer Schultz asked defendant Betton if he had anything illegal in his possession at the residence. The officer admitted there was nothing about defendant Betton that prompted any suspicions of illegal activity on his part. He further admitted that prior to questioning him, he had not given defendant Betton *Miranda* warnings and that the question was an attempt to elicit an incriminating response from him. Defendant Betton replied that he had "like an ounce in the bedroom." At Officer Schultz' request, defendant Betton led him to the bedroom where he pointed to a box from under the bed that contained crack cocaine. Defendant

Betton was removed from the residence and transported to the police station.

¶ 6 The trial court suppressed defendant Betton's statement to Officer Schultz at the Thompson residence as well as any physical gestures he made but denied the motion to quash arrest and to suppress evidence. The court determined that the drugs were seized pursuant to a valid search warrant. The court rejected trial counsel's argument that any statement defendant Betton made to police after he was taken to the police station should also be suppressed as fruit of the poisonous tree. The court noted that it was presented with evidence only as to the statements and physical gestures at the Thompson residence.

¶ 7 At defendant Betton's bench trial, Officer Schultz testified that at 3:25 a.m. on January 11, 2011, he had a conversation with defendant Betton at the police station located at 7808 South Halsted Street in Chicago. After advising him orally of his *Miranda* rights, Officer Schultz asked defendant Betton about the narcotics recovered from the Thompson residence. Waiving his *Miranda* rights, defendant Betton told the officer that he had purchased an "ounce from his guy V" the previous night for $1,000. He maintained that all the narcotics were his and that Ms. Thompson and her mother were not involved.

¶ 8 The trial court found defendant Betton guilty of possession of a controlled substance and sentenced him to six years' imprisonment. This appeal followed.

¶ 9 ANALYSIS

¶ 10 I. Admissibility of Defendant Betton's Second Statement

¶ 11 A. *Standard of Review*

¶ 12 When reviewing a ruling on a motion to suppress, the court defers to the factual and

credibility determinations made by the trial court and will reverse only if they are against the manifest weight of the evidence. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). The ultimate legal challenge to the trial court's ruling on the motion is reviewed *de novo*. *Slater*, 228 Ill. 2d at 149.

¶ 13 B. *Discussion*

¶ 14 Defendant Betton contends that the trial court erred when it denied his fourth amendment motion to quash his arrest and suppress evidence. He argues that his arrest was illegal and therefore, both his statement to Officer Schultz at the Thompson residence (the first statement) and his statement to the officer at the police station (the second statement) should have been suppressed as the fruit of the poisonous tree. The trial court did suppress his first statement, not because his arrest was illegal but on the basis that defendant Betton was not given *Miranda* warnings. Defendant Betton further argues that his second statement to Officer Schultz was not sufficiently attenuated from his illegal arrest. While raising several arguments in support of the legality of defendant Betton's arrest, the State maintains that even if his arrest was illegal, there was sufficient attenuation between his first and second statements for his second statement to be admissible against him.

¶ 15 We do not need to address the legality of defendant Betton's arrest. Assuming for purposes of the issues raised in this case that defendant Betton's arrest was illegal, his second statement to Officer Schultz was admissible against him at trial.

¶ 16 In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Supreme Court revisited its decision in *Oregon v. Elstad*, 470 U.S. 298 (1985) on the use of the "question first, warn later" interrogation

tactic to obtain an incriminating statement from a suspect. Under *Elstad*, a voluntary but unwarned statement did not warrant the presumption of compulsion, and subsequent warnings usually sufficed to remove the conditions that rendered the earlier statement inadmissible. *Elstad*, 470 U.S. at 314. In *Seibert*, Justice Souter, writing for a plurality of the court, replaced the voluntariness test with a presumptive rule of exclusion where the tactic was used deliberately. In order to determine whether "*Miranda* warnings delivered mid-stream could be effective enough to accomplish their object[]" the court considers the following factors: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Seibert*, 542 U.S. at 615. Where consideration of the above factors leads to the conclusion that a reasonable person, in the same position as the suspect, would not have understood from the mid-stream warnings that he retained a choice about continuing to talk, the subsequent statement is inadmissible. See *Seibert*, 542 U.S. at 617.

¶ 17 In his concurring opinion in *Seibert*, Justice Kennedy agreed that the deliberate use of the "question first, warn later" tactic was improper but that its use should not render a subsequent statement inadmissible where "curative measures" such as a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning, were taken that would allow "the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

¶ 18 In *People v. Lopez*, 229 Ill. 2d 322 (2008), our supreme court adopted Justice Kennedy's

concurring opinion as the controlling authority on the issue. *Lopez*, 229 Ill. 2d at 360. The court first determines whether the police deliberately used the "ask first, warn later" tactic. In the absence of any evidence of a deliberate use of the tactic in questioning the defendant, the *Seibert* analysis ends. If there is evidence to support a finding of deliberateness, the court determines whether curative measures were taken such that the defendant could distinguish between the two interrogations and to appreciate the significance of the *Miranda* warnings and of the *Miranda* waiver on any subsequent statement he might make. See *Lopez*, 229 Ill. 2d at 360-61; *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring)).

¶ 19 Generally, police officers will not admit on the record that they deliberately withheld *Miranda* warnings from a suspect in order to obtain a confession. S*eibert*, 542 U.S. at 616 n.6 (plurality op.); *Lopez*, 229 Ill. 2d at 361. In this case, Officer Schultz admitted that his question to defendant Betton at the Thompson residence was intended to invoke an incriminating response. Since there is evidence that Officer Schultz deliberately withheld the warnings in order to obtain the first inculpatory statement from defendant Betton, we must determine whether there were sufficient curative measures between defendant Betton's first statement to Officer Schultz and his second statement to Officer Schultz after he was given his *Miranda* warnings and chose to waive them.

¶ 20 The recent case of *People v. Hannah*, 2013 IL App (1st) 111660 is instructive. Based on a tip from an informant that a woman named "Angela" was selling cocaine at a certain residence, the police obtained a search warrant for the residence. The police executed the search warrant at 12 p.m. The defendant, who was not named in the warrant, was handcuffed along with Angelica

McKnight. During the search, a handgun was discovered in the bedroom. Without giving *Miranda* warnings, Officer Dennis asked the defendant and Ms. McKnight whose gun it was, and the defendant admitted it was his. The defendant was arrested and transported to the police station. At 2:40 p.m., after receiving *Miranda* warnings, the defendant agreed to speak to Officer Dennis and again admitted to the officer that the handgun was his. The defendant's motion to suppress was denied, and following a bench trial, he was found guilty of possession of a handgun by a felon. *Hannah*, 2013 IL App (1st) 111660, ¶¶ 10, 16.

¶ 21 On appeal, the court determined, first, that the defendant was in custody at the time he was questioned about the handgun and that Officer Dennis' question was "not merely general on-the-scene questioning regarding the facts of the crime," *i.e.*, the question did not aid the police in locating the weapon or in executing the search warrant. "Rather, such questioning was 'reasonably likely to elicit an incriminating response from the suspect.' " *Hannah*, 2013 IL App (1st) 111660, ¶ 47 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

¶ 22 While finding that the trial court erred by denying the motion to suppress the defendant's initial statement to the detective, the court found the error harmless where, after receiving *Miranda* warnings, the defendant again admitted ownership of the handgun. The court rejected the defendant's argument that the deliberate use of the "question first, warn later" interrogation tactic rendered the statement he made after he had been given *Miranda* warnings inadmissible, explaining as follows:

> "Even if Officer Dennis's conduct at the apartment constituted a deliberate employment of the impermissible question first, warn later interrogation strategy, we find the substantial

> break in time (almost three hours) between the pre-*Miranda* question posed by Officer Dennis and the subsequent transport of the defendant to the police station where he was properly Mirandized sufficiently served as a curative measure to allow the defendant to distinguish between the two contexts and appreciate that the interrogation has taken a new turn." (Internal quotation marks omitted.) *Hannah*, 2013 IL App (1st) 111660, ¶ 49 (quoting *Lopez*, 229 Ill. 2d at 360-61, quoting S*eibert*, 542 U.S. at 622).

¶ 23 In this case, the search warrant for the Thompson residence was executed on January 11, 2011, at 12:34 a.m. There was evidence that Officer Schultz deliberately used the "ask first, warn later," tactic in questioning defendant Betton resulting in his first statement. Defendant Betton was subsequently transported to the police station. At 3:25 a.m., defendant Betton was given *Miranda* warnings and agreed to speak with Officer Schultz. He gave a second statement in which he again admitted the cocaine was his. Similar to *Hannah*, there were almost three hours between defendant Betton's first statement without *Miranda* warnings and his second statement made after receiving *Miranda* warnings.

¶ 24 We conclude that the time between the statements served as a sufficient curative measure so that defendant Betton's second statement was sufficiently attenuated from his first statement and his arrest, even assuming it was illegal, so as to render the second statement admissible.

¶ 25 II. Ineffective Assistance of Trial Counsel

¶ 26 Defendant Betton contends that his trial counsel was ineffective; at the suppression hearing, counsel failed to present evidence of his second statement to the trial court and failed to clarify the State's burden of proof. He further contends that trial counsel was ineffective for

failing to move to suppress his second statement on the grounds that Officer Schultz deliberately used the "question first, warn later" tactic.

¶ 27 A. *Standard of Review*

¶ 28 "Where the facts surrounding the ineffective assistance claim are undisputed and the claim was not raised below, this court's review is *de novo*." *People v. Wilson*, 392 Ill. App. 3d 189, 197 (2009).

¶ 29 B. *Discussion*

¶ 30 We apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine if a defendant has been denied his right to effective assistance of counsel. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11. The defendant must show (1) counsel's performance was deficient, and (2) the deficient performance must be prejudicial to the defendant. *McGhee*, 2012 IL App (1st) 093404, ¶ 11. "The performance prong is satisfied 'if counsel's performance was objectively unreasonable under prevailing professional norms,' and the prejudice prong is satisfied if there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' (Internal quotation marks omitted.)" *McGhee*, 2012 IL App (1st) 093404, ¶ 11 (quoting *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010).

¶ 31 Both prongs of the *Strickland* test must be satisfied, or the claim fails. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). "If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance." *People v. Scott*, 2011 IL App (1st) 100122, ¶ 27; *Strickland*, 466 U.S. at

697.

¶ 32 The trial court suppressed defendant Betton's first statement to Officer Schultz, and therefore, it was not admissible against him at trial. His second statement to Officer Schultz was admissible at trial since it was sufficiently removed in time from his first statement and his arrest, even if the arrest was illegal. Since the second statement was admissible, even if trial counsel had committed the errors alleged by defendant Betton, the outcome of his trial would have been the same. Therefore, defendant Betton failed to establish the prejudice prong of *Strickland.*

¶ 33 CONCLUSION

¶ 34 We affirm the judgment of the trial court.